(2)

No. 88-68

In The

Supreme Court of the United States

October Term, 1988

OTIS DELAY,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

A.

Whether this Court should grant a writ of certiorari to review the Supreme Court of Georgia's determination that the Petitioner's arrest was based upon probable cause and that evidence seized thereafter was properly obtained by police authorities?

B.

Whether this Court should grant a writ of certiorari to review a determination by the Supreme Court of Georgia that the murder weapon in this case would inevitably have been discovered and that the Petitioner's statements in relation to the murder weapon were not inculpatory so as to create any harm to the Petitioner?

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STATEMENT OF THE CASE

A. Course of the Proceedings.

Petitioner, Otis Delay, Jr., was indicted in the Superior Court of Cobb County, Georgia, during the July Term, 1986, for the felony murder of Willie C. Gray. (R. 3-4).[1] Following a trial by jury, the Petitioner was found guilty as charged and received a sentence of life imprisonment. (R. 153, 174). The Petitioner's motion for new trial was denied on July 15, 1987, and a notice of appeal

[1]References made to the trial court record are designated as "R.". References made to the trial transcript are designated as "Volume —, T."

was filed on August 10. (R. 165-67, 180-1-2). On May 13, 1988, the Supreme Court of Georgia affirmed the Petitioner's conviction and sentence. *Delay v. State,* 258 Ga. 229, — S.E.2d — (1988). The instant petition for writ of certiorari now follows.

B. Statement of Facts.

The Petitioner and Lillie Maye Grogin resided at 261 McIntosh Avenue, Marietta, Georgia in Cobb County. (Volume III, T. 22, 31, 99, 128; Volume IV, T. 103-04). Mr. Willie Gray lived across the street and knew the Petitioner. (Volume IV, T. 104). In fact, witness Inman Rucker testified at trial that he had originally met Mr. Gray at the Petitioner's home. (Volume III, T. 16).

Mr. Inman Rucker also testified at trial as to the events that occurred during the afternoon of June 14, 1986. Mr. Gray and Mr. Rucker were sitting under a tree in Willie Gray's yard. (Volume III, T. 16). When Helen Burton drove up, Mr. Gray walked to the vehicle. (Volume III, T. 17, 19; Volume IV, T. 109). The Petitioner exited his residence and also approached the automobile. (Volume III, T. 19). The Petitioner and Mr. Gray spoke and then went into the Petitioner's residence together. (Volume III, T. 19-20).

Mr. Rucker further testified at trial that Mr. Gray exited the Petitioner's home after approximately 10 to 15 minutes as though to return home. (Volume III, T. 20, 30). According to Mr. Rucker, the Petitioner called to Mr. Gray. (Volume III, T. 21). In response, Willie Gray turned around and had his left hand on the porch rail. (Volume III, T. 21, 26, 30). The Petitioner then shot Mr. Gray

with a rifle. (Volume III, T. 21, 30). The victim fell on his back with his feet on the top steps of the porch and his head on the sidewalk. (Volume III, T. 34). The Petitioner reloaded the rifle saying, "Not none of you all saw me, better not come in my yard." (Volume III, T. 24). The Petitioner went inside his home and the authorities arrived shortly thereafter. (Volume III, T. 24).

Marietta Police Department officers John Freer and Jeffrey Knox arrived at the scene and observed the victim lying face up, evidencing an apparent gunshot wound. (Volume III, T. 124-25, 134-35). There did not appear to be any weapon on the porch. (Volume III, T. 131, 139). An empty shell casing was recovered from the front porch. (Volume III, T. 97, 103). An ambulance transported Mr. Gray from the scene. (Volume III, T. 136). As outlined more fully in the text of this brief, officer Freer arrested the Petitioner at the scene of the offense and the Petitioner's murden weapon was found in the home. (Volume III, T. 101, 126, 135). While transporting the Petitioner to the police station, the Petitioner stated that he had told the victim to leave twice and that he "did not believe what he did was wrong." (Volume III, T. 145).

Cobb County Medical Examiner Wayne Ross performed an autopsy of Willie C. Gray on June 15, 1986. (Volume IV, T. 60, 71). Dr. Ross observed a bullet hole to Mr. Gray's shirt that matched the entry wound to the victim's stomach. (Volume IV, T. 72, 82). Dr. Ross testified at trial that it was a distant gunshot wound. (Volume IV, T. 75, 84). The bullet traveled from the front to the back, from the right to the left, and in a downward direction. (Volume IV, T. 73). The missile went through the fat surrounding the intestines, the descending aorta, the lower part of the spinal column and exited from the back

of the victim. (Volume IV, T. 74). Mr. Gray died as a result of the gunshot wound to the abdomen. (Volume IV, T. 75). There was no indication that any kind of physical contact other than the gunshot wound had occurred. (Volume IV, T. 88).

State Crime Lab firearms examiner Richard Ernest received the Petitioner's Winchester, Model 94, 30-30 lever action rifle, 30-30 cartridge case and 2 live rounds of ammunition. (Volume III, T. 46, 57, 60-61). The rifle was in good mechanical condition and required approximately three pounds of pressure to pull the trigger. (Volume III, T. 67). Mr. Ernest testified at trial that the evidence cartridge case had been fired from the evidence rifle. (Volume III, T. 62).

The Petitioner testified at trial that Mr. Gray came over to the Petitioner's home but that Mr. Gray left when the Petitioner asked that he do so. (Volume IV, T. 105). The Petitioner alleged that Mr. Gray again returned to the Petitioner's home approximately 20-25 minutes later. (Volume IV, T. 105). The Petitioner admitted picking up the rifle and shooting Mr. Gray. (Volume IV, T. 105). The Petitioner also admitted that he did not see Mr. Gray with a weapon but alleged that he feared Mr. Gray would kill him. (Volume IV, T. 105, 106, 109, 112).

The trial jury found the Petitioner guilty of felony murder on January 16, 1987. (Volume V, T. 48). The Petitioner was sentenced to life imprisonment. (Volume V, T. 55).

Further facts will be developed herein as is necessary to more fully explain the Respondent's position.

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PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA CORRECTLY HELD THAT THE PETITIONER'S ARREST AND THE SUBSEQUENT DISCOVERY OF THE MURDER WEAPON WERE PROPER.

In his first allegation, the Petitioner alleges that the Supreme Court of Georgia improperly found no Fourth Amendment violation in the instant case in the circumstances surrounding the Petitioner's arrest and the ultimate discovery of the murder weapon in this case. Respondent submits that, contrary to the Petitioner's allegations, the Supreme Court of Georgia properly determined that there was no federal constitutional violation in this case and that this decision provides no basis for the granting of a writ of certiorari.

The specific circumstances surrounding the Petitioner's arrest are as follows. On June 14, 1986, at approximately 5:30 p.m., officer John Freer of the Marietta Police Department received a radio call of a shooting at 261 McIntosh Street in Marietta. (Volume II, T. 159; Volume III, T. 125). On his arrival at that location, officer Freer observed a black male lying face up on the porch of the residence with what appeared to be a gunshot wound to his chest. (Volume II, T. 159). Outside of the residence, there was a crowd of approximately fifty to sixty persons who were yelling and screaming to the officer when he arrived. *Id.* at 159-60.

During the officer's approach to the house, the officer heard at least fifteen different times from persons in

the crowd that the victim had been shot by the Petitioner and that the Petitioner was now in the house. *Id.* at 160. Persons in the crowd also informed the officer that the Petitioner was armed with a shotgun. *Id.* at 161.

Officer Freer approached the house, as his partners circled around the back of the house. *Id.* After ascertaining that there was no weapon lying near the victim, the officer approached the front door of the home. *Id.* Officer Freer heard someone approaching the door and feared that this person was the Petitioner and that the Petitioner would be armed with the shotgun. *Id.* Given this situation in which the officer believed that his life could be in danger, the officer took the initiative in the situation and as the Petitioner started to open the door, the officer pushed the door back himself. *Id.* at 161-62. The officer, having drawn his gun, pointed the weapon at the Petitioner and ordered him to the floor. *Id.* at 162. The officer asked the Petitioner who he was and the Petitioner identified himself as Otis Delay. *Id.* The officer then handcuffed the Petitioner and then placed the Petitioner under arrest. *Id.*

On direct appeal, the Supreme Court of Georgia determined that, while the Petitioner's arrest was warrantless, it was in fact supported by probable cause. *Delay v. State,* 258 Ga. at 230(2a). Basing its decision upon this Court's opinion in *Beck v. Ohio,* 379 U.S. 89, 91 (1964), the Supreme Court of Georgia noted that:

> A 'warrantless arrest' is constitutionally valid if, at the moment the arrest is made, the facts and circumstances within the knowledge of the arresting officeres and of which they had reasonably trustworthy information were sufficient to warrant a pru-

> dent man in believing that the accused had committed or was committing an offense. (Citations omitted).

Id. This determination by the Supreme Court of Georgia was correct as officer Freer did have reasonably trustworthy information from his own observations at the scene as well as from the persons outside of the home that the Petitioner had in fact shot and killed the victim in this case.

The Petitioner also challenges the discovery of the murder weapon in this case. The weapon had been discovered after the Petitioner had been arrested by officer Freer and the Petitioner had been placed on the floor of the living room of his home. (Volume II, T. 174). At that point in time, along with officer Freer was the officer's partner, Jeff Knox, and Marietta Police Chief, J. A. Whitmire. *Id.* at 8, 162-63, 174. As officer Freer was helping the Petitioner off of the living room floor, detective Dennis Graham of the Marietta Police Department arrived. *Id.* at 8-9, 174. As detective Graham walked into the living room, he generally commented, "Where is the weapon?" *Id.* at 8, 12, 162-63, 172. This question was not directed to anyone in particular and was not intended as a question to the Petitioner. *Id.* at 8, 12, 163. However, it was the Petitioner who responded, "I'll show you where it is." *Id.* at 8, 12-13, 163. The Petitioner then led the police officers to a nearby bedroom, where the rifle in question was laying on top of the bed. *Id.* at 8-9, 163. As detective Graham reached for the rifle, the Petitioner cautioned him that it was loaded and the detective ejected two live shells from the weapon. *Id.* at 9, 13.

On direct appeal, the Supreme Court of Georgia properly determined that in accordance with *Mincey v. Arizona,*

437 U.S. 385, 392-93 (1978), this "warrantless search" of the Petitioner's home was proper based upon the need to protect and preserve life or avoid serious injury under these exigent circumstances. *Delay v. State,* 258 Ga. at 230(b). Additionally, the Supreme Court of Georgia noted that the Petitioner's weapon was in plain view and, "it would have been discovered in the course of even the most cursory search of the house." *Id.* at 231(3a), *citing Nix v. Williams,* 467 U.S. 431, 448 (1984).

As such, given the exigent circumstances of the murder and the fact that the murder weapon was found in plain view at the scene of the crime, the Supreme Court of Georgia properly determined that there was no Fourth Amendment violation presented by the discovery of the rifle.

For all of the above and foregoing reasons, the opinion by the Supreme Court of Georgia presents no basis which would justify the granting of a writ of certiorari to review these allegations by the Petitioner.

B. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT THE PETITIONER'S STATEMENT WAS ADMISSIBLE AT TRIAL.

In his second and final allegation of the petition, the Petitioner alleges that his rights under the Fifth and Sixth Amendments to the United States Constitution were violated by the admission of his statement at trial.

First of all, Respondent must note that the Petitioner has not previously raised for appellate review and the Supreme Court of Georgia did not address any Sixth Amendment claim in the instant case. Instead, the issue

raised on direct appeal regarding the admissibility of the Petitioner's statement, as noted in the Petitioner's own brief, was stated as follows:

> Statements elicited by police from an arrestee while in custody without benefit of Miranda warnings are in violation of the Fifth Amendment right against self-incrimination, as made applicable to the states through the Fourteenth Amendment. The court therefore erred in denying Appellant's motion to suppress statements obtained from the Appellant while in custody and the "fruits" obtained as a result of these statements; and in denying Appellant's motion for a new trial.

(Petitioner's brief on direct appeal, pp. 7-8). Neither this particular allegation, nor the Petitioner's motion for a new trial, address any Sixth Amendment allegations. Additionally, the Supreme Court of Georgia addressed the admissibility of the Petitioner's statement only in a Fifth Amendment context. *Delay v. State*, 258 Ga. at 230-31 (3a-c). Therefore, to the extent that the Petitioner is attempting to raise a Sixth Amendment claim, this allegation presented for the first time on review to this Court is improperly presented and provides no basis for the granting of a writ of certiorari.

As to the Petitioner's Fifth Amendment claim regarding the admissibility of his statement, the facts at trial demonstrated that the Petitioner had given two statements. The first statement, as outlined above, dealt with Petitioner's statement volunteering the location of the murder weapon. The second statement which is apparently challenged by the Petitioner occurred when the Petitioner was being transported to the Marietta Police Station by

officer David Fann. (Volume II, T. 4-5, 7). The Petitioner asked the police officer, "Why am I being arrested?" *Id.* at 4. The officer explained that he assumed that the Petitioner was being arrested for murder, but it was not up to the officer to decide what charge would be lodged. *Id.* at 4-5. The Petitioner then replied, "I don't think what I did was wrong. I told the guy twice to leave." *Id.* at 5.

On direct appeal the Supreme Court of Georgia determined that the Petitioner's first statement, in relation to the location of the murder weapon, was basically irrelevant as the location of the murder weapon would have been discovered anyway given that the rifle was in plain view and as the first statement was not inculpatory or inconsistent with the Petitioner's defense. *Delay v. State,* 258 Ga. at 231(3a)(b). As to the second statement given by the Petitioner, the Supreme Court of Georgia properly determined that in accordance with *Miranda v. Arizona,* 384 U.S. 436, 444-45 (1966), the Petitioner's statement was not the result of questioning initiated by the police officers, but was instead the Petitioner's response to the police officer's answer to the Petitioner's own question. *Id.* at 231(3c).

Given these factual circumstances, the Supreme Court of Georgia properly determined that there was no violation of the Petitioner's Fifth Amendment rights in the instant case and, therefore, this allegation also presents no basis for the granting of certiorari.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that there is no substantial federal question not previously decided by this Court and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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